STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company, Filing to Implement Tariff Provisions Related to Section 13-801 of the Public Utilities Act	: : : : :	Docket No. 01-0614

REPLY COMMENTS TO JOINT CLECS ON RE-OPENING OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

Matthew L. Harvey
Michael J. Lannon
Sean R. Brady
Eric M. Madiar
Brady D.B. Brown
Stefanie R. Glover
Office of General Counsel
Illinois Commerce Commission
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
(312) 793-2877

Counsel for the Staff of the Illinois Commerce Commission

October 25, 2004

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company, Filing to Implement Tariff Provisions Related to Section 13-801 of the Public Utilities Act	: : : : :	Docket No. 01-0614

REPLY COMMENTS TO JOINT CLECS ON RE-OPENING OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

The Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, pursuant to Section 200.800 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.800), respectfully submits its Initial Brief in the above-captioned matter.

I. Introduction and Summary of Position

Joint CLECs make four arguments in response to SBC's Revised Opening Comments on the Remand in this proceeding. First, they argue that SBC is subject to and must comply with Section 13-801 of the PUA, as interpreted by the Commission's Section 13-801 Order, because the company has voluntarily sought alternative regulation ("Alt-Reg") status under Section 13-506.1 of the PUA.[1] Second, they contend that SBC's obligations under Section 13-801 of the PUA are "consistent" with and not preempted by federal law because SBC may comply with both its obligations under the federal Telecommunications Act of

[1] Joint CLEC Response to SBC's Revised Comments On Reopening, at 3, 11, 16-17 (Oct. 4, 2004) ("Joint CLEC Response").

1996 (the "Federal Act") and state law.[2] Third, the CLECs argue that the Commission has no authority to preempt all or portions of Section 13-801.[3] Finally, Joint CLECs level multiple claims against SBC's Revised Opening Comments, ranging from allegations that SBC incorrectly described the state of federal law and the company's federal unbundling obligations, to SBC's inclusion of issues purportedly beyond the scope of this proceeding, let alone the *TRO*[4] or the USTA II[5] decision.[6] The Joint CLECs also make detailed arguments regarding individual unbundling obligations.

II. Argument

As an initial matter, the Staff notes that it stands upon its opening comments, and does not intend to recapitulate them at length here. With respect to contested issues, the Staff requests that the Commission decide matters in the manner Staff recommends in its opening comments. Staff notes, however, that certain issues raised in the Joint CLECs' Response require explication, and in some cases rebuttal.

---

[2] Id. at 18-27.

[3] Id. at 12-16.

[4] *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, In the Matter of: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers / Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 / Deployment of Wireline Services Offering Advanced Telecommunications Capability, FCC No. 03-36, CC Docket Nos. 96-98, 98-147, 01-338 (August 21, 2003) (hereafter "Triennial Review Order" or "TRO")

[5] U.S. Telecom Ass'n v. FCC, 359 F.3d 554; 2004 U.S. App. Lexis 3960 (D.C. Cir. 2004) (hereafter "USTA II")

[6] Joint CLEC Response, at 28-71.

A. Alt-Reg and Section 13-801 Obligations are Closely Related

As noted above, the Joint CLECs argue that SBC's status as an Alt-Reg carrier affects its rights in this proceeding. Staff agrees with Joint CLECs that SBC struck a regulatory compact regarding Alt-Reg: one that the Commission should not permit SBC to disown.

Both the legislative history of Section 13-801 and the Commission's *Alt-Reg Review Order*[7] reveal that SBC's Alt-Reg status is conditioned on, among other things, the company's compliance with Section 13-801.

1. The Legislative History of Section 13-801 Supports the Relationship Between Alt-Reg and Section 13-801

SBC is the only telecommunications carrier enjoying Alt-Reg status, which, in turn, renders Section 13-801 applicable to the company. While Section 13-801(a) of the PUA is unambiguous in this respect, the plain language of the section also evinces the General Assembly's intent to impose those additional unbundling obligations on carriers subject to alternative regulation as a condition of alternative regulation.[8] Further, even assuming *arguendo* that Section 13-801

---

[7] *Final Commission Order*, Illinois Bell Telephone Company: Application for review of alternative regulation plan / Illinois Bell Telephone Company: Petition to Rebalance Illinois Bell Telephone Company's Carrier Access and Network Access Line Rates / Citizens Utility Board and the People of the State of Illinois -vs- Illinois Bell Telephone Company: Verified Complaint for a Reduction in Illinois Bell Telephone Company's Rates and Other Relief, ICC Docket No. 98-0252/0335; 00-0764 (consol.) (December 30, 2002), 2002 Ill. PUC Lexis 1219 (hereafter "Alt-Reg Review Order").

[8] 220 ILCS 5/13-801(a) ("A telecommunications carrier not subject to regulation under an alternative regulation plan pursuant to Section 13-506.1 of this Act shall not be subject to the provisions of this Section, to the extent that this Section imposes requirements or obligations upon the telecommunications carrier that exceed or are more stringent than those obligations imposed by Section 251 of the federal Telecommunications Act of 1996 and regulations promulgated thereunder.")

is unclear in this respect, the provision's legislative history leads to the same conclusion.[9]

Section 13-801 to the PUA was one of many provisions contained in the General Assembly's 2001 rewrite of Article XIII of the PUA, or Public Act 92-0022. Public Act 92-0022 was signed into law by then-Governor George Ryan on June 28. 2001.[10] Public Act 92-0022 was the enactment of House Bill 2900, which was sponsored by State Representative Julie Hamos and State Senator David Sullivan.

In the course of floor debate in the State House, the following exchange between Representative Bost and Representative Hamos evidences the General Assembly's intent to condition SBC's, or any other telecommunications carrier's, Alt-Reg status upon compliance with Section 13-801:

> Bost: All right. With this, another mention…something else was mentioned that the only person that has to…or only group that has to work on dealing with a majority of this Bill is Ameritech. And that's not true. What Section of the Bill deals with Ameritech? And what of the whole Bill deals with all others, including Verizon and the small company?
>
> Hamos: The most important…I think one of the most important components of this Bill that applies to every carrier, not just Ameritech and Verizon, but the many other new carriers who are coming into the marketplace, is that certain service

---

[9] *See* Krohe v. City of Bloomington, 329 Ill. App. 3d 1133, 1136-37, 769 N.E.2d 551, 553-54 (4th Dist. 2002) (explaining that it is appropriate to look to legislative floor and committee debates to discern legislative intent when the statutory provision at issue is ambiguous); Maiter v. Chicago Bd. of Education, 82 Ill. 2d 373, 386, 415 N.E.2d 1034, 1039 (Ill. 1980) (same with respect to legislative committee debates).

[10] Message of Governor George H. Ryan to the Illinois General Assembly, June 28, 2001 (http://www.legis.state.il.us/legislation/legisnet92/hbgroups/hb/920HB2900gms.html). Public Act 92-0022 did not become effective, however, until June 30, 2001 pursuant to its effective date. See Public Act 92-0022 § 99 (http://www.legis.state.il.us/legislation/publicacts/pubact92/acts/92-0022.html) ("This Act takes effect June 30, 2001).

quality standards be met. And that means certain time frames for providing installation and repair and certain penalties if, in fact, it doesn't happen in the way that the ICC and the Bill provides. So, service quality is actually a right under this Bill for both residential and business customers. *There are some Sections of the Bill, for example, the Section 801 that I had referred to, which is really the market opening portion of this Bill, which right now is applying to Ameritech only, but our hope will be that with a short sunset that four years from now there will, in fact, be competition statewide. And I believe that those sections will be open statewide, as well.*

Bost: *Just to expand on your answer, I think that with [13-]801, any other carrier, if they would ever get to the point for Alt Reg, they would then qualify, as well, regardless of what carrier that would be. It's not specific to Ameritech, it's based on the situation that exists at this time.*

Hamos: *That is correct.*

92nd Ill. Gen. Assembly, House Proceedings, May 31, 2001, at 157-58 (colloquy of Representatives Bost and Hamos) (emphasis added).

A similar exchange occurred in the State Senate between Senators Clayborne and Sullivan. Senator Clayborne asked why Section 13-801 did not apply to Verizon. Senator Sullivan responded Verizon was excluded because the company currently does not have Alt-Reg status, but "if Verizon chooses to go to alternative regulation, which is the form of regulation that Ameritech is under, they are subject to Section 13-801." 92nd General Assembly, Senate Proceedings, May 30, 2001, at 48 (colloquy of Senators Clayborne and Sullivan). The full text of that colloquy is contained in the footnote below.[11]

---

[11] *See* 92nd General Assembly, Senate Proceedings, May 30, 2001, at 47-48:

Senator Clayborne: Well, I - - I guess you didn't answer my - - maybe you did answer my question again, Senator Sullivan, and I guess the answer to my question is, no, we didn't require more flexible times. We didn't allow for those

2. The Commission's Alt-Reg Review Order Supports a Relationship Between Alt-Reg and Section 13-801

While House Bill 2900 made its way through the General Assembly, the Commission was conducting a review of SBC's continued Atl-Reg status in the *Alt-Reg Review Order*. The Administrative Law Judge ("ALJ") assigned to the matter issued a proposed order on May 22, 2001, and the parties filed briefs on exceptions to that order. Alt-Reg Review Order at *3-*4. On July 5, 2001, the ALJ issued a ruling requesting the parties to submit briefs and reply briefs discussing the impact of Public Act 92-0022 on the proceeding. Id. at *4. The parties subsequently filed those briefs and reply briefs in July and August of 2002. Id.

In its *Alt-Reg Order*, the Commission made clear that while the General Assembly re-enacted Section 13-506.1 without amendment, the legislature *did* add other provisions to Article XIII of the PUA that "direct certain activity by or

---

working families or those - - those single mother who can't afford to stay around their house all day, to benefit from this. Your know I - - I - - we - - talk about competition and you talk about competition, but my understanding, Verizon is excluded from 13-801 and they don't have to have competition. So, again I guess we're pointing it out for one company, but for another company, we're saying, "Youd don't have to be competitive. We'll let you create your own little monopoly at some point down the line." Didn't - - doesn't this bill exclude Verizon?

Senator Sullivan: Verizon is subject to all the service qualify standards, and if Verizon chooses to go alternative regulation, which is the form of regulation that Ameritech is under, they are subject to Section 13-801.

Senator Clayborne: But right now, they're not subject to - - to 13-801, even though they have their own exclusive territory.

Senator Sullivan: They are subject to all those points that go to federal law. They are not subject to any new additions in this package.

related to carriers operating under alternative regulation." Id. at *123. As a result, the Commission stated that it was required to include those new statutory changes in its "overall" analysis of whether continue SBC's Alt-Reg status under Section 13-506.1. Id. at *124.[12]

As the Commission explained at one point:

> Our analysis, however, continues as we review and consider in more detail, the new statutory changes which are mentioned in the parties' arguments. In doing so, the Commission is mindful of the fact that Section 13-506.1 has not been changed under the recent legislative initiative. *Other provisions, however, were enacted which are expressly and specifically directed to telecommunications carriers operating under Section 13-506.1, alternative regulation. We are compelled to consider these new directives even as we proceed to Section 13-506.1 in this matter. It is well-settled principle that a court determines the legislature's intent by examining the entire statute and by construing each material part or section of the legislation together, and not each part or section alone.* [citations omitted].
>
> Id. at *349 (emphasis added)[13]

---

[12] *Alt Reg Review Order*, at *123-*124 ("While we agree with [Ameritech] that the Plan was not designed to further or promote competition, it was designed to allow Ameritech to respond to competition that did not materialize as expected in 1994. Without competition, there is no impetus for alternative regulation. The plan was also designed to provide benefits to consumers, which is also heavily dependent on competitive pressures. Overall, alternative regulation has reduced regulatory delay and costs to the benefit of all concerned, promoted efficiency more than traditional regulation, and facilitated the dissemination of technical improvements to all classes of ratepayers equally as well as traditional regulation. We note that the General Assembly retained Section 13-506.1 in its recent review and rewrite. It further validated the viability of alternative regulation by modifying the Act to include provisions that direct certain activity by or related to carriers operating under alternative regulation. This action, prescribed in Section 13-103 (e) is another, and highly critical element, to be factored in our "overall" assessment.").

[13] *See also Alt-Reg Review Order*, at *453 ("Based on the whole of our historical review, the Commission has determined that the alternative regulation plan for AI should and will be continued (See Part III above). *The recent action of the General Assembly - which not only reenacted Section 13-506.1, but also directs specific action by and concerning carriers operating under alternative regulation - supports this end. But, the record also showed a need to modify certain of the plan's current features going forward and we have duly attended to this task. In doing so, we took careful note that the General Assembly very recently amended the Act in several respects. Those amendments, relevant to the operation of the Plan, were taken into account and result in modifications consistent with the legislature's intent.* Overall, however, the statutory criteria of Section 13-506.1 (b) (including the policy goals and considerations under subsection (b)(4)) that guided our initial plan approval, have continued to inform our action as we move the plan forward.") (emphasis added).

In particular, when evaluating whether SBC's Alt-Reg Plan was in the public interest, as required under Section 13-506.1(b)(1),[14] the Commission found that it was not so and needed to be modified. Id. at *167. Among other things, the Commission specifically referred to the newly enacted Section 13-801, and stated that SBC's prospective compliance with that section, among others, would allow the Commission to conclude that SBC's modified Alt Reg plan was in the public interest. Id. at *166-*170. As the Commission explained in relevant part:

> Section 13-506.1(b)(4) requires the Commission to assess whether alternative regulation "constitutes a more appropriate form of regulation" based on the requirements contained in Section 13-506.1 and 13-103. (Citations omitted.) Similarly, Section 13-506.1(b)(1) requires that the Plan be "in the public interest." In our 1994 Order, we found that this provision "…takes into consideration all of the policies and criteria set forth in response to Section 13-506.1(a)(1)-(6), 13-103, and 13-506.1(b)(2)-(7)." (Citation omitted.) Given our conclusion that the Plan did not fully meet our expectations or statutory criteria, we find that the Plan must be changed going forward to fix its shortcomings so that it may be considered "in the public interest".
>
> We note however that Staff, GCI and others do not stop and rest on their criticisms of the Plan, but have each developed detailed and comprehensive proposals for the future. For example, on the critical issue of service quality, we are presented with a number of options to ensure that performance at acceptable levels will be maintained going forward. All of this suggests that the public interest can be restored.
>
> Unfortunately, we have found that despite satisfying the $3 Billion infrastructure investment requirement, Ameritech's service quality still deteriorated. In addition, since Ameritech did not face significant competitive pressures over the course of the Plan, *the Company has displayed a reluctance to invest in network upgrades and innovation unless there is a regulatory requirement to do so. The Commission finds solace in recent amendments to the Public Utilities Act that are designed to increase competition and increase access to advanced services. P.A. 92-22, effective June 30, 2001, contained many revisions to Article XIII of the Public Utilities Act that we expect will increase the level of competition*

[14] 220 ILCS 5/13-506.1(b)(1); *Alt-Reg Review Order*, at *162.

in telecommunications services and thereby increase the competitive pressures on Ameritech to innovate and to make market-driven investments in its network. For instance, Section 13-801, which is only applicable to carriers governed by Alt Reg, includes many pro-competitive provisions that should allow carriers to gain a competitive foothold. By applying this major initiative to only Alt Reg companies, the Illinois legislature has recognized the benefits that can be derived from increased competition for Ameritech. These amendments also included new Section 13-517, which requires all incumbent local exchange carriers (including Ameritech) to "offer or provide advanced telecommunications services to not less than 80% of its customers by January 1, 2005." We expect that this directive should have a favorable impact on network modernization and economic development.

In addition, we find that the modified penalty structure put in place for service quality degradation should be ample incentive for Ameritech to invest sufficient amounts where needed and maintain its service quality at standards going forward. This should only cure the much-publicized service quality problems that affected Ameritech customers, but will promote economic development in the State.

Taken as a whole, the Commission finds that the Alt Reg Plan as modified herein is a more appropriate form of regulation for Ameritech and is in the public interest. As we have observed, we are beginning to see increased competitive activity in Ameritech's territory and we continue to believe that price carp regulation is better suited to respond to these increasing competitive pressures than rate of return regulation. Staff notes that ROR regulation has a number of well-documented problems stemming from its diminished incentives for cost efficiency and technological innovation. An even greater handicap is that it cannot be readily adjusted to provide pricing flexibility when warranted. *Moreover, Ameritech would no longer be required to adhere to the pro-competitive goals embodied in Section 13-801 of the Public Utilities Act if we reverted back to rate of return regulation.*

There were a number of considerations that the Commission took into account when it adopted alternative regulation for the Company [in 1994]. Those same consideration as well as the new considerations raised by the new provisions of Article XIII compel us to conclude that alternative regulation is more responsive to meet the challenges of an ever-changing telecommunications market.

Alt Reg Review Order, at *166-*170 (emphasis added).

In short, the Commission weighed a number of factors, specifically including SBC's expected ongoing compliance with Section 13-801, in concluding that the company's alternative regulation plan was in the public interest.

As a final matter, the fact that the General Assembly imposed the additional unbundling obligations contained in Section 13-801 on SBC by statute as a condition and incident of Alt-Reg status, rather than delegating the task to the Commission is of little import. As the United States Seventh Circuit Court of Appeals has explained in a similar context:

> Illinois may choose to exercise such powers as it has through the City of Chicago, the "owner" of O'Hare. It might withdraw home rule from Chicago and *exercise these power through legislation of general application*. Or it might exercise these powers through the courts. Neither the Constitution nor the Federal Aviation Act * * * determines how Illinois apportions its governmental powers. Whether Illinois should allow its courts some role in setting noise levels at O'Hare is the state's business.
>
> Bieneman v. City of Chicago, 864 F.2d 463, 471-72 (7th Cir. 1988).[15]

The same situation obtains here. The General Assembly could have delegated the Commission task of imposing those additional unbundling obligations found in Section 13-801 on SBC. Instead, the General Assembly chose to act directly by enacting a binding statute, which is clearly its province. Accordingly, the Commission should take its cue from the General Assembly and hold SBC to the regulatory compact.

3. Conditions Attached to SBC's Alt-Reg Status Are Not Subject To Federal Preemption

[15] *Accord* Philip v. Daley, 339 Ill. App. 3d 274, 291, 790 N.E.2d 961, 973 (2nd Dist. 2003).

It should be noted that recently the Illinois Appellate Court held that Commission conditions imposed on SBC under Section 13-506.1 are not subject to federal preemption so long as competitive telecommunications carriers have interconnection agreements with SBC. In Illinois Bell Telephone Co. v. Ill. Commerce Comm'n, SBC challenged two aspects of the Commission's *Alt Reg Order*: (1) the imposition of the company's service quality remedy plan from SBC's 1999 Merger Order; and (2) the requirement that SBC makes additional capital expenditures of $600 million per year in Illinois. 2004 Ill. App. LEXIS 1126 (3rd Dist. 2004).

With respect to the first point, SBC argued that the Commission lacked the authority under Section 13-506.1 of the PUA to impose the remedy plan on SBC and include it in the company's alternative regulation plan. SBC also claimed that even if the Commission had such authority, that authority was preempted by federal law. Id. at *12-*16. The appellate court rejected both of SBC's arguments. The court held that Section 13-506.1 of the PUA gave the Commission independent and broad authority to not only impose the remedy plan "as a condition of continued alternative regulation," but also "to implement, review modify *any* alternative regulation plan." Id. at *13-*14 (emphasis added).

As to SBC's preemption claim, however, the appellate court agreed that while the Commission could not require the company to make the remedy plan available to competitive carriers lacking interconnection agreements with SBC, SBC *was required* to make the remedy plan available to those competitive carriers with such agreements with SBC. Id. at *15-*16.

With respect to the second point—the capital expenditure requirement—the appellate court concluded that while the Commission had the authority to impose the requirement, the Commission failed to support its decision with sufficient evidence. Id. at *23-*25. As a result, the appellate court remanded the entire *Alt Reg Order* back to the Commission and directed the Commission to enter an order consistent with the court's disposition. Id. at *25.

As the Illinois Appellate Court made clear, alternative regulation "is a tool to move the telecommunications industry from monopoly to market [competition]." Illinois Bell Telephone Co., 283 Ill. App. 3d at 185, 669 N.E.2d at 925 And, according to the Commission's *Alt Reg Order*, "[w]ithout competition, there is no impetus for alternative regulation." Id. at *123. Section 13-801's legislative debates indicate that, at minimum, some members of the legislature, if not the General Assembly itself, viewed SBC as exercising monopoly power in its service territory, and Section 13-801 embodied the legislature's means to bring about competition.[16] It is beyond dispute that nascent competition has developed

---

[16] *See* 92nd General Assembly, House Proceedings, May 31, 2001, at 166 (colloquy of Representatives Davis and Hamos):

Davis: * * * First, let me say that I'm not quite as euphoric as you are about the fact that this may be the most consumer-friendly Bill in the United States of America. Because currently now, and correct me if I'm wrong, but it's my belief that…and I think it's been testified to many times in the committee hearings that we've attended that Ameritech has approximately 98% of the residential…Ameritech currently has about 98% of the residential lines that are services in their service area. And by anybody's definition, that's a monopoly and I don't disagree with that. So, it's…And correct me if I'm wrong, under Section 801, we are saying that we are opening up this residential market that Ameritech currently has a monopoly on to the competitors, to the CLECs, to open up competition. Is that correct?

Hamos: Yes.

92nd General Assembly, Senate Proceedings, May 30, 2001, at 50-51 (statements of Senator Ronen) (""we all have had experience with our telephone service, either our cells [sic] [ourselves] or through constituents. And one of the things that's clear is that the quality of local phone

in SBC's service territory and Section 13-801 has accomplished, in part, its goal.[17]

An alternative regulation plan adopted by the Commission is a complex and inextricably interrelated fabric; and tugging on one part affects every other.[18] The Commission and Appellate Court both recognized that Section 13-801 has a role to play in the continuing effective functioning of SBC's Alt Reg plan. Illinois Bell Telephone Co., 283 Ill. App. 3d at 211, 669 N.E.2d at 936 . To scupper Section 13-801 could render the Alt Reg Plan, crafted with so much effort and

---

service has been extremely poor over these last years, and that's a result of Ameritech having monopoly control over the system. And while monopoly might be a great board game and work well that way, it – doesn't server consumers well. And what this bill is about, really, is consumers and helping consumers get better rates. * * * *But the most important part of this bill is the part that deals with competition. What we've all talked about is Section (13-)801. This bill requires we open up the networks, our networks, the public networks. Ameritech talks about them as their own. They're not their own. Those are networks that were built by ratepayer dollars. They were in a controlled environment. They took virtually no risk. They were guaranteed profits, and they made extremely high profits over the years, did not put those profits back into infrastructure or into developing innovations, and we've all seen the effect of a monopoly control over a system*.") (emphasis added); Id. at 53 (statements of Senator Welch) ("[House Bill 2900 is] not the greatest answer to every problem in the world with – with phone companies. It didn't pretend to be that. But what it does, it takes care of a lot of problems people have every, single day. It tries to open up the monopoly and create competition. It tries to bring in other companies. If anything we've learned about the economy, is you need competition. We keep talking about California and how we don't want to have California happen here, with their energy problems. We don't want to have that happen with our phone system. 'If we start deregulating, it could be terrible.' 'We could end up losing a lot of phone service.' Well. It's a totally different story. We've got plenty of competition here, but they can't get in to compete. Ameritech keeps them out. And, you know, it used to be Ameritech was a local company, but now that they're taking over, we're getting this advice out of Texas. When we though we had a bill worked out, suddenly the troops came in from Texas. Well, you know, I'm sick and tired of being told by these companies in Texas how to run Illinois businesses. You know, they – they've got an old saying down in Texas: Don't mess with Texas. Well, you know what, Ameritech? Don't mess with Illinois. We're sick and tired of it. That's why we got this bill.").

[17] *Cf*. ICC 2002 Annual Report to the General Assembly on Telecommunications Markets in Illinois; ICC 2004 Annual Report to the General Assembly on Telecommunications Markets in Illinois.

[18] Illinois Bell Telephone Co. v. Ill. Commerce Comm'n, 283 Ill. App. 3d at 211, 669 N.E.2d at 936 ("We find that the alternative regulatory plan adopted in the present case is a complex and inextricably interrelated fabric. Tugging at one end of the plan might unravel the entire plan. [Since we reverse one portion of the Commission's order adopting the plan, [w]e, therefore, must reverse the order in toto."); Alt-Reg Order, at *455-*456 ("Alternative regulation is, in many ways a delicate and measured thing. As such, we find it unnecessary to keep the many, and sometimes competing goals in perspective and evenly balanced. Otherwise, the good produced at one end will overwhelm or unravel the objectives of another.").

time by the Commission, parties and Staff, ineffective in achieving its important purpose.

In the Staff's view, a regulatory compact exists here, and it is one that the Staff has vigorously supported, as, for example, by recommending that the Commission not reinitialize rates in the *Alt-Reg Review*, a recommendation that the Commission accepted. Staff stands squarely behind alternative regulation, which in its view has benefited, and is likely to continue to benefit, ratepayers and SBC alike, as well as to foster competition. Staff also stands squarely behind the Commission's application of Section 13-801, as appropriately interpreted by the Commission.

B. No Preemption Analyses or Constitutional Questions are Implicated In this Proceeding

The Joint CLECs also suggest that the Commission lacks the authority to preempt Section 13-801, or find it unconstitutional. Joint CLEC Response at 12, *et seq*. The Staff takes no exception to this as a general proposition. However, the Joint CLECs have clearly misstated the issue in this proceeding. The question here is not whether the Commission can preempt Section 13-801, or find it unconstitutional, but rather whether, and if so, to what extent, the Commission can amend its *Section 13-801 Order* to render it consistent with the *Triennial Review Order, USTA II*, the *UNE Interim Requirements Order* and Section 13-801. The Commission clearly has the authority to amend its own orders as needed from time to time as a matter of statute. *See* 220 ILCS 5/10-113 ("[T]he Commission may at any time, upon notice to the public utility

affected, and after opportunity to be heard … alter or amend any … order or decision made by it."). As should be clear from the Commission's Order on Reopening, this is precisely what it proposes to do here. *See* Order on Reopening at 8-9 ("[T]the Commission finds it necessary to reopen this case to reconsider the Commission's Order in terms of the TRO and the USTA II decision, and to amend its Order where required to comport with the terms of those decisions."). Moreover, this is precisely what the U.S. District Court directed the Commission to do on remand. As the District Court observed:

> [T]he Commission's proposed remand is both consistent with the FCC's mandate for agencies reconsider their decisions in light of the TRO and also assist in winnowing the issues before the court. While it is true that the ICC cannot declare Section 13-801 preempted or unconstitutional, the ICC is not powerless to revise its decision. The ICC is empowered to (1) reconstrue the requirements of Section 13-801, (2) revisit and resolve any ambiguities in statutory language, and (3) reconsider its application of the statute's requirements to the particular facts of this case. In reconstruing Section 13-801, the ICC could reach a different conclusion that may resolve some or all of SBC's claims, or, at least, more accurately define the issues before the court. Because of its unique experience with the state telecommunications regulatory scheme, the ICC is in the best position to evaluate in the first instance whether, and to what extent, the FCC's TRO impacts its decision. The Commissioners' motion for remand is therefore granted.
>
> *Minute Order*, Illinois Bell Telephone Company v. Kevin K. Wright, *et al.*, Case No. 02 C 6002 (N.D. Ill. May 17, 2004)

Thus, this proceeding is not one in which the Commission seeks to preempt or void Section 13-801. The Joint CLECs' somewhat alarmist characterization should therefore be discounted.

C. The Joint CLECs' Contention that SBC Should Have Filed an Illustrative Tariff with its Comments Should be Ignored

The Joint CLECs state that they "expected SBC to file proposed changes to its state tariffs to illustrate the impact of what it believes state law requires[,]" which "SBC failed to do[.]" Joint CLEC Response at 27. The CLECs argue that "SBC should not be allowed to submit proposed tariff changes without allowing all interested parties to review and comment on any such proposed changes." Id. at 28.

If either the Commission or ALJ entered an order that required SBC to meet the Joint CLECs' expectations in this regard, the Staff is unaware of it. Further, to the extent that this proceeding results in tariff changes, the CLECs certainly have the right to seek review of such changes. Accordingly, the CLECs' concerns in this regard are at leas premature.

D. The Commission can Consider Entrance Facilities

The Joint CLECs decry what they characterize as "SBC's attempt to have this Commission revisit its ruling on entrance facilities[.]" Joint CLEC Response at 28. They argue that the *TRO's* decision to exclude entrance facilities from Section 251(c) unbundling obligations is somehow not effective at this point. Id. at 28-9. The Joint CLECs assert that there is a "very real possibility that, on remand, the FCC will classify entrance facilities as UNEs[.]" Id. at 31. This being the case, aver the Joint CLECs, the Commission should defer this issue "until the next phase of this proceeding." Id.

There is a distinct flaw in this argument: the fact that the USTA II decision left intact the FCC determination that ILECs need not continue to offer entrance facilities on an unbundled basis, remanding it to the FCC "for further

development of the record to allow proper judicial review." USTA II, 359 F.3d at 594, 2004 U.S. App. Lexis at 109. This means the current state of federal law is that ILECs need not continue to offer entrance facilities on an unbundled basis, regardless of the "very real possibility" that this may change after the FCC has reviewed the matter on remand. In this proceeding, the Commission should cause its decision to be informed by the state of the law as it is now, rather than rely on the Joint CLECs' speculation regarding what it may be at some future time.

The Commission may well find that the plain language of Section 13-801 requires unbundling of entrance facilities, and hence affirmation of that portion of its *Section 13-801 Order* that deals with such facilities. However, it should not consider the CLECs' suggestion that it do so based upon speculation regarding the future state of federal law.

E. The Joint CLECs are Correct with Respect to Routine Network Modifications

The Staff concurs in the Joint CLECs' analysis of SBC's obligation to perform routine network modifications. Joint CLEC Response at 49-52.

F. SBC Must File Tariffs

The Joint CLECs make extensive arguments in support of SBC's obligation to file tariffs setting forth rates, terms and conditions applicable to the offerings it is required to make under Section 13-801. Joint CLEC Response at 66, *et seq*. The Staff concurs in the proposition that SBC must tariff its Section

13-801 offerings. However, Staff takes a less complicated view of the question than do either the Joint CLECs or SBC. Assuming that SBC is required by Section 13-801 to offer certain elements and services, then the matter is quite simply a state law question, and SBC is indeed required to file tariffs pursuant to Section 13-503, which incorporates tariffing requirements applicable to public utilities generally. 220 ILCS 5/13-503. This being the case, and the matter therefore being one that does not implicate federal law in any respect, the Commission need not resort to extensive argument or analysis of preemption doctrine or federal decisions regarding whether, and under what circumstances, states can require ILECs to tariff Section 251 services and elements; instead, it simply should declare that SBC must file tariffs setting forth rates, terms and conditions for its state-mandated offerings.

III. CONCLUSION

WHEREFORE, for all the reasons set forth herein, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in this proceeding.

Respectfully submitted,
Illinois Commerce Commission Staff

By:_____
One of its attorneys

Matthew L. Harvey
Michael J. Lannon
Sean R. Brady
Eric M. Madiar
Brady D.B. Brown
Stefanie R. Glover
Illinois Commerce Commission
Office of General Counsel
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
(312) 793-2877
(312) 793-1556 (Fax)

Counsel for Staff of the
Illinois Commerce Commission

Date: October 25, 2004